or improvements. But in both cases such payment may be evidence of surrender and new tenancy."

In *Fenner v. Blake,*[6] Channell J. said:—

"It is by no means uncommon for a landlord and tenant to agree by parol to a variation of the terms of an existing tenancy, such as an alteration in the amount of the rent, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to the rent would be perfectly good and sufficient in point of law."

In *Inchiquin (Lord)* v. *Lyons*[7] Morries C.J. said:—

"I am not aware of any case deciding, as an abstract proposition, that in no case can a landlord and tenant agree to raise the rent without creating a new tenancy. That would lead to extraordinary consequences. More generally there is a reduction of rent; and suppose a reduction is made to a tenant, and an arrangement that he is to hold on at the reduced rate, and that such reduced rate is to relate back to a previous period, would that create a new tenancy? I presume that if an arrangement to increase the rent would *ipso facto* create a new tenancy an agreement for a reduction would have the same effect. The consequences of that are, at all events, worthy of consideration. I am not aware that such a proposition has ever been decided, and I think it is contrary to the ordinary right that two persons are to be prevented from entering into an agreement, which is not immoral or against public policy, *viz.*, that the rent is to be increased or diminished, without putting an end to the old tenancy."

In the case here the evidence shows that the tenant himself agreed to the increase of rent during the continuance of the tenancy and there is nothing to show that as regards the tenancy in question the general law of contract requires that it should be determined before rent can be increased.

The counterclaim is dismissed with costs.

Counterclaim dismissed.

Solicitors: *Rithauddeen & Aziz; Wrigglesworth & Co.*

RE LIM LENG CHEAK, DECD.; LIM EOW THOON v. LIM KENG CHUAN & ANOR.

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) June 19, 1969]

[Penang—Federal Court Civil Appeal No. X.60 of 1968]

Trust and Trustees — Trust for burial ground — Whether trust had become incapable of performance — Plea of res judicata.

This was an appeal against the judgment of Ong Hock Sim J. ([1968] 2 M.L.J. 235) dismissing the appellant's prayer for a declaration that the trust in relation to certain burial land had become impossible of performance and that there was therefore a resulting trust of the said land in favour of the appellant. In an earlier application the High Court had held that the trust still subsisted ([1965] 2 M.L.J. 154). An appeal had been lodged against that decision but a consent order had been made on terms. In this appeal it was argued: (i) as the authority had refused to give burial permits to certain parts of the land and had also indicated that it would not do so in future, the trust had become incapable of performance and therefore there was a resulting trust in favour of the appellant; (ii) the learned judge was wrong in holding that the defence of *res judicata* applied.

Held, dismissing the appeal: (1) the trust in this case had not failed as there was still a trust to maintain and keep in order the graves that were in existence and there were parts of the land as to which there was no indication that the authority would refuse to give burial permits;

(2) the learned judge was wrong in holding that *res judicata* applied, as the issue before him was different from that previously decided, in that in this case the court was asked to say that there had been a failure of the trust by reason of the fact that the authority had since the date of the prior judgment refused to allow further burials.

Case referred to:—

(1) *In re Scholfield's Will's Trusts,* and *Scholfield* v. *Scholfield & Ors.* [1949] 1 Ch. 345.

FEDERAL COURT.

C.H. Smith (*Ong Huck Lim* with him) for the appellant.

C.O. Lim for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of Ong Hock Sim J. at Penang, dismissing the appellant's prayer for a declaration that a certain trust in reference to a certain land had become impossible of performance and there was therefore, a resulting trust of the said land in favour of the appellant.

The said land was part of the real property of the estate of one Lim Leng Cheak deceased, which eventually by the order of the High Court in Penang, dated 21st December, 1927 was vested in his widow Madam Tan in her own right absolutely.

By an indenture dated 24th March, 1929 made between Madam Tan of the first part and the appellant on the second part, it was agreed that the estate of the said deceased should be finally wound up and for the consideration therein mentioned, Madam Tan agreed to transfer to the appellant for his own use absolutely when called upon to do so, all the landed properties of the said estate in Penang and Kedah.

The said land has been used and maintained as a burial ground for the said Lim Leng Cheak deceased, his family and descendants including lots 140(11), 43(1), 43(2), 43(3), 135, 13(1), 13(2), 13(3), 13(4), 139(2), 139(3), 143 and 144(1), all in Mukim XVIII in Penang. It was the intention of the said Madam Tan and the appellant that the said

land and hereditaments be maintained and kept as such burial ground.

Accordingly, by an indenture dated 17th September, 1930, made between Madam Tan of the first part, the appellant of the second part and the respondent and another, of the third part, Madam Tan conveyed the said burial land to the respondent and the other as trustees to hold on the trust and conditions to be made by a separate deed of declaration of trust. In addition, the trustees thereby covenanted to maintain and keep the said land as a burial ground for the use and benefit of the family and descendants of the said Lim Leng Cheak deceased, not to sell, mortgage or otherwise dispose of the same and that they would out of the profits and income to be derived therefrom maintain and keep in good order and repair all graveyards, tablets and tombs then erected or thereafter to be erected on any part thereof.

No separate deed of declaration of trust was ever made.

In 1962, the Government of Penang acquired lots 139(3), 139(2), 144(1), and 143 for which the Collector of Land Revenue awarded a sum of $183,925.59 as compensation. This sum was paid into court. Subsequently the appellant applied to the High Court in Civil Suit No. 48 of 1963* for a declaration that as no separate deed of declaration of trust was ever made as envisaged in the said indenture there has been a failure in the trust and there was accordingly a resulting trust in respect of the properties comprised in the said indenture in favour of the appellant and that the money in court representing an amount awarded in respect of the said land acquired by the Government should be paid to the appellant.

The trustees as defendants in that action and respondents in this appeal, claimed that despite the fact that no separate deed of declaration of trust was ever made there was no resulting trust in favour of the appellant either in respect of the property referred to in the said indenture other than the property which had been acquired, or in respect of the the property which has been acquired. The respondents counter-claimed that a declaration that the trust of the burial grounds of the family of Lim Leng Cheak deceased, in terms of the said indenture subsisted. Hepworth J. in that suit dismissed the appellant's claim holding that the trust still subsisted and directed that the money in court did not go to the appellants upon a resulting trust and that the same said money be paid to the respondents and other persons in that suit. The appellant appealed against the judgment in Civil Suit No. 48 of 1963 but when that appeal came before the Federal Court on 19th April, 1967, a consent order was made by the Federal Court in the following terms namely that the decree dated 7th day of May, 1965 be varied as follows:

(1) that the costs of all parties in both courts be taxed as between solicitor and client and when so taxed be paid out of the funds in the court and

(2) that from the balance of the funds in the court after paying such costs 20% thereof be paid to the trustees to be invested by them and

(3) that the other 80% of such remaining balance to be paid to the appellant and

(4) that this compromise was to be settlement of all outstanding claims and disputes between the parties as regards past accounts and past accounting.

On 25th January, 1968 the appellant by originating summons No. 14 of 1968 applies to the court for the following orders:

(1) Construction of the indenture dated 17th September, 1930.

(2) For a declaration that in the events that have happened the trust comprised in the above indentures have become impossible of performance and there is a resulting trust in the above funds in favour of the appellant.

In his affidavit in support of the application the appellant after reciting certain facts relating to the history of the matter, to some of which I have just referred, pointed out that on 28th February, 1966, he wrote to the Collector of Land Revenue, Penang, asking for a burial permit in reference to lots 139(3), 139(2), 140 (2), 144(1), 143, 135, 43(3). 43(1) and 13 (1). In reply the Collector stated that a burial permit could only be given for lot 140(1) and that no more burials would be allowed in reference to the other lots. Lot 140(1) it will be noticed, is not one of the lots mentioned in the list of lots in the appellant's letter, and as a matter of fact, according to the appellant's affidavit, that lot and another lot 140(5) belong to another trust called the Ong Bee Neoh Trust. It is also apparent that there are still other lots namely 140(3), 140(4), 140(6), 140(7), 43(2). 13(3) and 13(4) in reference to which there is no evidence as to whether a permit could have been given for burial purposes or that they have already been used as burial plots. The learned trial judge, Ong Hock Sim J. in the present case, accepted the respondents' contention that the consent order made by the Federal Court only had reference to the matter of costs and

* [1965] 2 M.L.J. 154.

to the acquisition monies paid into court and did not extend to that part of the judgment of Hepworth J. in Civil Suit No. 48 of 1963, that the trust created by the indenture was still valid and subsisting and also that even if no more burials were to be permitted the other trust concerning the maintenance and upkeep of all graves, tablets and tombs on the said hereditaments as directed by clause 25 of the said indenture were still valid and subsisting and capable of performance.

Ong Hock Sim J. however, did not refer in his judgment to the declaration of trust made by the appellant subsequent to the judgment of Hepworth J. As a matter of fact from what I can see from the record of proceedings before Ong Hock Sim J. there was no reference made to this declaration by either counsel, although the respondent in his second affidavit said that this new declaration of trust was bad in law in that it purported to give authority to the appellant to withdraw wholly from the trust for his own benefit. I am inclined to agree with Hepworth J. when he was considering the indenture of 1930, that that indenture was complete in itself and that it required no separate deed of declaration of trust. It is obvious that the appellant purported to make this subsequent declaration of 1967 in order to give him authority to give to himself the proceeds of any sale of land which can no longer be used as a burial ground for the family.

Before us the grounds of appeal may be briefly stated to be two main grounds, namely (1) by reason of the fact that the authority had refused to give burial permits to certain parts of the said land and also indicated that it would not do so in the future, the trust has therefore become impossible of performance and therefore there was a resulting trust in favour of the appellant and (2) as to the question of *res judicata.*

Also to the first question, I am inclined to agree with the view taken by Ong Hock Sim J. that there was still a trust to maintain and keep in good order the graves that are in existence. In addition to that, however, there would appear to be certain parts of the land in reference to which there is from the record of appeal no indication that the authority would also refuse to grant burial permits. As to the argument that the consent order approved by the Federal Court has in effect given an implication that there has been a failure in the trust, I do not agree with this conclusion. The order itself stated that the decree made by Hepworth J. was merely varied with the effect stated in the order. It did not purport to set aside the main decision of the learned judge as to the validity and subsistence of the trust.

For these reasons in my view, the appeal must fail on the first ground.

As to the question of *res judicata,* in my view, the issue before Ong Hock Sim J. was different from that decided by Hepworth J. in that Ong Hock Sim J. was asked to say that there has been a failure of the trust by reason of the fact that the authority had since the date of the previous judgment refused to allow further burials. To that extent I respectfully disagree with Ong Hock Sim J.

I would, however, dismiss the appeal with costs.

Suffian F.J.: This appeal involves 13 pieces of land (totalling in area 102 acres 3 roods 29 poles) originally the subject of a will executed on 30th March, 1900, by the plaintiff's father Lim Leng Cheak, who died on 10th February, 1901. Fortunately we do not have to deal with events going as far back as the beginning of this century and for our purposes we need to go back only to 1929. In that year it was agreed between the only then surviving parties interested in the trust (the deceased's widow and their son, the plaintiff) that the estate should be wound up and for a certain consideration the widow was to transfer the lands concerned to her son absolutely.

The lands had been maintained as a burial ground for the deceased, his family and descendants. The widow and her son desired that the lands should be maintained as a family burial ground. For that purpose the son requested three trustees, of whom the first defendant is the only survivor (he seems to be a grandson of the deceased and the plaintiff's nephew), to look after the lands and apply the income from them in the maintenance of all graveyards, tablets and tombs on them, which they agreed to do. Accordingly on 17th September, 1930, an indenture was executed by the widow, the son and the three trustees, under which the widow at the son's request conveyed the lands to the trustees "to hold the same unto the trustees in fee simple to the intent that the same shall be held by the trustees upon the trust and conditions to be by a separate deed of declaration of trust hereinafter declared concerning the same." The trustees jointly and severally covenanted with the plaintiff, his executors or administrators that they would during their lives and the life of the last survivor of them maintain and keep the lands as a burial ground for the deceased, the family and descendants and would not sell, mortgage or otherwise dispose of the lands and that they would out of the profits and income to be derived therefrom maintain all graveyards, tablets and tombs erected on the lands.

First, it will be noted that immediately prior to the creation of the trust, the lands belonged or could have belonged absolutely to the plaintiff; secondly, that the trust is only during the lives of the trustees and the life of the last survivor of them, so that after the death of the defendant (the sole surviving trustee) the trust will expire and the lands will revert to the plaintiff; thirdly, that the trust was to maintain the lands as a family burial ground and there is no question of any beneficiary living to enjoy the fruits of the trust; and fourthly, that the trustees have no power to sell, mortgage, or otherwise dispose of the lands.

In 1962 parts of the six lots were compulsorily acquired by the Government for the purpose of building a road up Penang Hill and a compensation of $183,925.59 was awarded by the collector. Owing to conflicting claims from the plaintiff and the trustees (then more than one), the collector deposited this sum in court.

The plaintiff claimed in Suit No. 48 of 1963 that there was a resulting trust of this money in his favour. Hepworth J. in a judgment reported at [1965] 2 M.L.J. 154 held against the plaintiff's contention. The plaintiff appealed to the Federal Court, which by consent varied the judgment of the learned trial judge to this effect:

(a) from the balance of the funds in court, after paying costs, 20% thereof be paid to the trustees to be invested by them; and

(b) that the other 80% of such balance be paid to the plaintiff.

I shall refer to the points in dispute in that suit in detail below.

After the trial and before the hearing of the appeal, the plaintiff's solicitors wrote to the Collector of Land Revenue, Penang, on 28th February, 1966, for a permit to burry the remains of a lady said to be a descendant of the deceased in any part of nine specified lots. On 23rd September, 1966, the plaintiff's solicitors received the collector's reply refusing permission.

After the judgment of the Federal Court, the plaintiff on 25th February, 1968, took out an originating summons to ask the court to construe the indenture of 17th September, 1930, and to declare that in the events that had happened, the trust comprised in the indenture had become impossible of performance and there was a resulting trust of the lands in favour of the plaintiff.

The summons was taken out against the first defendant and against Lim Keng Teong. The second defendant has since withdrawn from the trust and may be ignored, and so I shall refer to the first defendant simply as the defendant. (He is the respondent to this appeal).

The defendant argued before Ong Hock Sim J. that the validity of the trust had been finally adjudicated upon by Hepworth J., that the matter was *res judicata,* that the consent order made by the Federal Court had reference only to costs and to the money representing the lands compulsorily acquired and did not extend to that part of the judgment that the trusts created by the indenture were still valid and subsisting, that even if no more burials were to be permitted, the other trusts concerning the maintenance and upkeep of all graveyards, tablets and tombs on the lands still subsisted and were capable of performance. Ong Hock Sim J. agreed.

The plaintiff appeals to us.

With deep respect, I think that the learned judge was wrong in holding that the defence of *res judicata* applied.

In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered, in the first action that which he seeks to recover in the second. A plea of *res judicata* must show that the same point has been actually decided between the same parties. *Halsbury's* Laws of England, 3rd Edition, Vol. 15, paragraph 358.

Was the cause of action in the instant case the same as that before Hepworth J. and has the same point been actually decided between the parties? In the earlier proceedings the plaintiff submitted two things. First, he submitted that, as no separate deed of declaration of trust was ever made as envisaged in the indenture, there had been a failure of the trust and that there was accordingly a resulting trust in respect of all the lands in favour of the plaintiff. As to this, Hepworth J. decided that, as there was no uncertainty as to the trust property nor as to the beneficiaries nor as to the way in which the property was to be applied, all the prerequisites for the creation of an express trust were present and he accordingly held that the indenture was a deed creating a trust which was complete in itself and required no separate deed of declaration of trust. In the instant case the plaintiff makes no such submission.

Secondly, in the earlier proceedings the plaintiff also submitted that the money in court representing the amount awarded in respect of of the lands compulsorily acquired should be paid out to him on a resulting trust, as it was no longer possible for the lands acquired to be

used as a burial ground. As to this, Hepworth J. held against the plaintiff, on the principle enunciated is *In re Scholfieldes Will's Trusts*, and *Scholfield* v. *Scholfield & Ors.*[1] In the instant case this point does not call for a decision. All that the plaintiff seeks to establish is that, as no burial will be permitted by Government in future on the nine lots, the subject of the collector's letter dated 23rd September, 1966, the trust has become impossible of performance and consequently there is a resulting trust in favour of the plaintiff.

In view of the above, I think that it is open to the court to consider the plaintiff's application.

In my judgment it has no merits.

The plaintiff's present application is based on two things.

First, as the Government no longer permits nine lots to be used as burial grounds, the trust has become impossible of performance.

Secondly, since the earlier proceedings the plaintiff has executed a separate deed of declaration of trust on 15th August, 1967, that is, after the disposal of the appeal against Hepworth J.'s judgment. This declaration begins at page 50 of the record. It will be recalled that the indenture of 17th September, 1930, creating the trust stated that the lands shall be held by the trustees "upon the trust and conditions *to be by a separate deed of declaration of trust hereinafter declared* concerning the same." The deed of declaration subsequently executed by the plaintiff states in clause 6 that "in the event of the Commissioner of Land at Penang or any other Government officer forbidding further burials on the said hereditaments or any part thereof, then and in such an event the present trustees shall reconvey the part or parts on which no further interments are permitted to the [plaintiff] and on failure of the present trustees to reconvey as aforesaid after written demand by the [plaintiff], then the [plaintiff] shall be at liberty to proceed under clause 5 hereof".

Clause 5 is in the following terms:—

"The [plaintiff] may at any time or times by deed wholly withdraw from the trust for his own benefit or otherwise and without substituting any equivalent for same, any portion or portions, or the whole of the said hereditaments, and may by such deed revoke all the limitations, trusts, powers, and provisions declared in the appointment indenture of or concerning the lands so withdrawn, and may by the present trustees of funds the subject of the said trust."

The plaintiff argues that these two clauses expressly reserve a power to revoke the trust and consequently on his application to the court there is created a resulting trust in respect of the lands in his favour.

As to his first argument, there is evidence that burial is prohibited on nine lots but there is no evidence that burial has been forbidden on *four other lots*, namely Nos. 13(2), (3), (4) and 43(2) totalling in area 4 roods 21 poles. So there has been failure of only *part*, not of the whole purpose of the trust, and the plaintiff cites no authority before us establishing that in the event of partial failure, a resulting trust is created in his favour in respect of all or any of the lands.

As to his second argument, it is true that where an express trust is created it may be revoked if a power of revocation is expressly reserved. But I do not agree with the plaintiff's argument that the indenture of 17th September, 1930, and the declaration of trust of 15th August, 1967, should be read as one instrument. Hepworth J. in the earlier proceedings held that the indenture of 17th September, 1930, was complete in itself and required no separate deed of declaration of trust; and I am of the view that if it was desired to reserve a power of revocation, it should have been so reserved in the 1930 indenture. That was not done and it was too late for the plaintiff to reserve this power 37 years later, in 1967.

In the result, with respect I agree with Ong Hock Sim J.'s conclusion though for different reasons.

I would therefore dismiss this appeal.

Costs to be paid by the plaintiff.

Gill F.J.: I have had the benefit of reading the judgments in draft of the Lord President and of my brother Suffian, and I agree that this appeal should be dismissed for the reasons stated by them.

Appeal dismissed.

Solicitors: *Ong Huck Lim & Co.; Lim, Lim & Oon.*

LIEW SIEW & ANOR v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) July 1, 1969]

[Perak — Criminal Appeal No. 12 of 1969]

Criminal Law and Procedure — Application for certificate for appeal to Federal Court on ground that principle of law is involved — Onus on accused — Whether defence under duty to call witnesses offered to it by prosecution — Whether failure to call any witness justifies adverse inference against defence — Presumption under Road Traffic Ordinance, 1958, s. 144(b).

Road Traffic — Pirate taxi — Passengers — Failure to call one of, as witness — Presumption — Road Traffic Ordinance, 1958, s. 144(b).